SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1722

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment and ruling of the Appellate Department of the Superior

Court of the State of California for the County of Los Angeles, entered against Petitioner in the above-entitled case on January 29, 1974, not issue.

OPINIONS BELOW

No written opinion was rendered by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirming the judgment of conviction on January 29, 1974, following remand by this Court in Kaplan v. California, 413 U.S. 115 (1973). However, prior to remand by this Court, the said Appellate Department of the Superior Court rendered a memorandum opinion and judgment in this case in Kaplan v. California, 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372 (1972). See also Kaplan v. California, 415 U.S. 115 (1973), Petitioner's Opening Brief, Appendices C through G, inclusive.

JURISDICTION

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered January 29, 1974. A copy of the said judgment appears in Appendix A of Petitioner's petition. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the California Court of Appeal was denied by the said Appellate Department on February 20, 1974. A copy of the said order appears in Appendix B of Petitioner's petition.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the California Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code §1471; California Rules of

Court, Rules 24(a) and 28(b); Smith v. California, 361 U.S. 147, fn. 2 (1959); Virginia Ry. Co. v. Mullins, 271 U.S. 220, 222 (1925).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner's conviction for violation of California Penal Code §311.2, is violative of First and Fourteenth Amendments and inconsistent with the decisions of this Court rendered on June 21, 1973, in Miller v. California, 413 U.S. 15; Kaplan v. California, 413 U.S. 115; Paris Adult Theatre I v. Slaton, 413 U.S. 49; United States v. 12-200 Ft. Reels of Super 8mm. Film, 413 U.S. 123; United States v. Orito, 413 U.S. 139; Heller v. New York, 413 U.S. 483; Roaden v. Kentucky, 413 U.S. 496; Alexander v. Virginia, 413 U.S. 836; and the decision of the California Court of Appeal in People v.

Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973).

2. Whether that portion of California's test of obscenity that the matter be "utterly without redeeming social importance" renders California Penal Code §§311 and 311.2 violative of the First and Fourteenth Amendments because of vagueness, ambiguity, uncertainty and overbreadth.

3. Whether the Petitioner's conviction, based on statewide community standards of prurient interest and customary limits of candor, rather than national standards, is in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments.

4. Whether the provisions of California Penal Code §§311 and 311.2, which do not not specifically define the exact sexual conduct which must be depicted or described in order to come within the provisions of said

sections, are vague, uncertain, overbroad and ambiguous, in violation of the First and Fourteenth Amendments.

5. Whether the jury was properly instructed in light of Miller v. California, supra; Kaplan v. California, supra; Paris Adult Theatre I. v. Slaton, supra; United States v. 12-200 Ft. Reels, supra; United States v. Orito, supra; Heller v. New York, supra; Roaden v. Kentucky, supra; Alexander v. Virginia, supra; and People v. Enskat, supra.

6. Whether California Penal Code §§311 and 311.2, on their face as authoritatively construed and applied, require proof of scienter, and whether such evidence was sufficient in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution

of the United States and the pertinent provisions of California Penal Code §§311 and 311.2 as they appear in Appendix C of Petitioner's petition are applicable. Also, California Penal Code §312.1 which states:

> "In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bear upon the question or

redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense. (Added by Stats. 1969, c. 925, p. 1854, §1. Amended by Stats. 1970, c. 1072, p. 1910, §3.)"

and California Penal Code §1127(b) which states:

"When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinions with the

reasons stated therefor, if any, by expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

No further instruction on the subject of opinion evidence need be given. (Added by Stats. 1929, c. 876, p. 1939, §1.)"

STATEMENT OF THE CASE

Petitioner was charged with violating California Penal Code §311.2 for the sale of the book entitled "Suite 69" at an "adult book store" in the County of Los Angeles on May 14, 1969. California Penal Code §311.2 states in relevant part:

". . . where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

Following a jury trial, Petitioner was convicted on the said violation.

Petitioner then filed an appeal with the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The Appellate Department rejected Petitioner's federal constitutional claims with a written opinion and affirmed the judgment of conviction. Kaplan v. Cali-

fornia, 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372 (1972). Petitioner's due and timely petition for rehearing or, in the alternative, for certification of transfer to the California Court of Appeal was granted on February 7, 1972, but denied by the California Supreme Court on February 17, 1972. Subsequently, Petitioner's petition for a writ of habeas corpus was denied by the California Supreme Court on April 12, 1972. Thereafter, Petitioner's petition for a writ of certiiorari was duly filed and granted by this Court in Kaplan v. California, 413 U.S. 115 (1973). In Kaplan this Court vacated the judgment of the Appellate Department of the Superior Court and remanded this case for further consideration in light on this Court's decision rendered in Miller v. California, 413 U.S. 15 (1973) and companion cases.

Following remand to the Appellate Department of the Superior Court, the California

Court of Appeal affirmed in People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973) that California Penal Code §§311 and 311.2 are constitutional and enforceable in light of Miller, supra, and companion cases.

The California Court of Appeal held that the state obscenity statute, as construed, could continue to be applied in state obscenity prosecutions. In Enskat a petition for hearing before the California Supreme Court was denied on October 24, 1973.

Therefore, the opinion of the California Court of Appeal in Enskat is binding upon the Appellate Department of the Superior Court. Following the ruling of this Court in Miller, et. al., and the aforesaid ruling in Enskat, the Appellate Department of the Superior Court affirmed the judgment of conviction of the trial court. It is well to note that subsequently, a petition for a writ of certiorari in Enskat v. California, October Term, 1973,

No. 73-1136, was denied by this Court. 42 U.S.L.W. 3712 (U.S. July 30, 1974).

Petitioner's petition for rehearing or, in the alternative, for certification of transfer was later denied by the said Appellate Department of the Superior Court on February 20, 1974. Thereafter, an order recalling the remittitur and staying issuance of the remittitur to and including April 10, 1974, was issued to permit Petitioner time to file a petition for a writ of certiorari in the Supreme Court of the United States. On April 8, 1974, an order was made by Mr. Justice William O. Douglas, which continued the above-stated order of the Appellate Department of the Superior Court pending reconsideration of said application for a writ of certiorari.

Respondent now replys with this brief in opposition to a granting of a writ of certiorari.

REASONS FOR DENYING THE WRIT

1. California Penal Code §§311 and 311.2 define as obscene matter which, taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards, is to prurient, i.e., a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance.

It is incorrect to state, as does Petitioner, that the provisions of California Penal Code §§311 and 311.2 solely embody the test set forth in Memoirs v. Massachusetts, 383 U.S. 413 (1966), inasmuch as the California statute was enacted in 1961 and Memoirs, supra, was decided in 1966, some five years later. The California legislature mere-

ly adopted part of the definition of obscene matter set forth in Roth v. United States, 354 U.S. 476 (1957), as one of the elements of the crime set forth in Penal Code §311.2. Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152 (1963).

2. The California Court of Appeal in People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), did not speak to the question of whether California Penal Code §311 was specific enough on its face to meet the requirements of Miller, et. al., but instead limited itself to a consideration of whether it had been authoritatively construed so as to meet such requirements. The court in Enskat, supra, did not consider whether the California statute, on its face, was directed at depictions of defined sexual conduct, as opposed to expression [Miller, supra at 24, fn. 6 (1973)], or whether it was an existing state statute in which ". . . all that is required is that the

language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." [Miller, supra, at 28, fn. 10, as Mr. Justice Brennan stated for the Court in Roth v. United States, 354 U.S. 476, 491-492 (1957).] While Miller has been apparently interpreted as inferring that California Penal Code §311 is not specific enough on its face, Respondent submits that it is more specific than federal statutes which have been saved, such as 19 U.S.C. §1305(a) and 18 U.S.C. §1462. United States v. 12-200 Ft. Reels, supra, at 130, fn. 7; United States v. Orito, supra, at 140, fn. 1; United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

The California Court in Enskat, supra, ruled that California Penal Code §§311 and 311.2, as they have been authoritatively construed in the past, were valid in light of Miller, et. al. With this conclusion of

the California Court of Appeal, Respondent agrees.

Part of the test of obscenity under which Petitioner was convicted was the requirement that the matter be shown to be "utterly without redeeming social importance." As this Court correctly pointed out in Miller, supra, at 22, this test called on the prosecution to prove a negative, ". . . a burden virtually impossible to discharge under our criminal standards of proof." Nevertheless, the prosecution did so in this case. Respondent used the test of which Petitioner now complains which, until now, he has been content, if not delighted with, for 13 years.

Petitioner has seized upon the fact that this Court reduced the prosecution's burden to claim that California's statute, containing as it does, such a test, is obviously unconstitutional on its face. The most direct answer to Petitioner's contention is that if it were

correct, this Court would have so held in Miller, supra.

Respondent submits that nothing this Court said in Miller, et. al., can be fairly construed to imply that a conviction based partly on a required finding that the matter was without redeeming social importance can be said to be constitutionally invalid.

3. Petitioner's trial was conducted and his conviction was obtained upon a theory that a national standard of First Amendment protection applied, not a national community standard to determine what is obscene. Miller, supra, at 30. As this Court stated:

> "To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility. . . Nothing in the First Amendment requires that a jury

must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."
Miller, supra, at 30-32.

In light of such reasoning, the jury in this case was instructed to decide whether the said book, "Suite 69," appeals to prurient interest and goes substantially beyond customary limits of candor measured by the contemporary community standards of the State of California. This instruction to the jury in this case is identical to that instruction given to the jury in Miller. As this Court stated in Miller, supra, at 33, citing Mishkin v. New York, 383 U.S. 502, 508-509 (1966):

". . . the primary concern with requiring a jury to apply the standard

'of the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, than a particularly susceptible or insensitive person--or indeed a totally insensitive one."

With this reasoning of the Court, Respondent fully agrees. Respondent submits that the requirement that the jury in this case evaluate the materials with reference to "contemporary standards of the State of California" serves the protected purpose enunciated and is constitutionally adequate. Miller, supra, at 33-34. As in Miller, proof of contemporary community standards of prurient interest and customary limits of candor, the so called "community standard," was of such standards as they existed in the entire State of Califor-

nia, and not some smaller area nor of the entire nation.

The aforesaid concepts were approved by this Court in Miller and continue to be applied in California. It is apparent to Respondent that Petitioner fails to distinguish such concepts in his argument.

If one accepts Petitioner's theory that a national standard of First Amendment protection is now "clearly unconstitutional", and only a statewide standard can apply, it is difficult to see how this or any other obscenity case can possibly present a federal question. Actually, this Court left unsettled the question of how small a geographic area may be and still establish a viable constitutional standard (albeit of pruriency and limits of candor). Under Petitioner's theory, the standard of First Amendment protection may end up as small as a jury box. Respondent doubts that Petitioner seriously desires such

a course of action.

4. There exists no express authority for Petitioner's proposition that California Penal Code §§311 and 311.2 do not on their face meet the specificity requirements of Miller. Rather, it must be inferred from this Court's opinions in Miller, supra, and Kaplan, v. California, 413 U.S. 115 (1973) and from the fact that the California Court of Appeal in Enskat, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973) which addressed itself only to the question of how the statute had been construed in order that the due process requirement be satisfied, that the "precision of regulation" which the First Amendment demands had been met. Since this Court stated that a statute might be valid as written or construed, and left the question up to the Orange County Superior Court in Miller and the Los Angeles County Superior Court in Kaplan, therefore, Petitioner's argument that the statute is not

specific on its face is without merit because it does not address itself to the question of whether it has been properly construed. It is well to note that this Court denied a petition for writ of certiorari in Enskat v. California, October Term 1973, No. 73-1241, 42 U.S.L.W. 3717 (U.S. July 30, 1974); and denied an appeal in Miller v. California, October Term 1973, No. 73-1508, 42 U.S. L.W. 3719 (U.S. July 30, 1973); all California cases dealing with the constitutionality of California Penal Code §§311 and 311.2.

5. Petitioner seems to argue as if his case were tried according to the standards set forth in Miller, et.al., but by virtue of the California statute. The fact is, the standards of proof met by the prosecution in Petitioner's case were much more stringent than those which Miller allows. The record in this case utterly and completely refutes Petitioner's contention that the jury was

requested to assert their own subjective and unguided predilections with respect to the suppression of said book.

In Miller, et. al., it is implicit that a conviction under California Penal Code §311.2 could be sustained, at the very least, if the California statute had been authoritatively construed as were federal statutes in United States v. 12-200 Ft. Reels, supra; United States v. Thirty-Seven Photographs, supra; and United States v. Orito, supra. With regard to California case law the California Court of Appeal in Enskat, supra, determined that California's obscenity statutes had been so 'authoritatively construed" and Respondent submits that Petitioner's contention in this regard lacks merit or serious consideration.

As previously stated, the California Court of Appeal in Enskat held that, prior to the date Petitioner violated Penal Code § 311.2, California's obscenity statutes had been au-

thoritatively construed in such a manner and thus, satisfied the requirements of Miller, et. al. Petitioner urges that this is not so, but it seems to Respondent that he is merely attempting to substitute his judgment for that of the California Court of Appeal and California Supreme Court.

In the first place, it seems to Respondent that this Court, by its order in Miller and companion cases, decided that the question be left to state courts. Quoting from Miller, supra, at 29, this Court stated:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously before the adoption of the First Amendment to this day."

See Roth v. United States, supra, at 482-485

Inherent in this quote is the concept that interpretation of California statutes is a function of the state courts and not the federal courts. Also, Petitioner has made no showing that the California Supreme Court and California Court of Appeal are not to be trusted to carry out the mandate of this Court.

To grant this petition would be tantamount to an expression of willingness of this Court to review practically every previous obscenity case from each of the 50 States in the Union.

Second, it seems clear that the opinion that the California obscenity statute had been authoritatively construed so as to meet requirements and are even more stringent than those imposed by Miller, supra, and United States v. 12-200 Ft. Reels, supra.

Finally, Petitioner urges that only an au-

thoritative judicial construction could only have issued from the California Supreme Court, and no lower court, in only one case, specifically reading into the statute particular types of sexual conduct which might not be depicted or described. In fact, the California Supreme Court has cited People v. Enskat, supra, as authority for the proposition that California Penal Code §§311 and 311.2 are constitutional in light of Miller, et.al., In re Koomer, Crim. No. 17835, July 3, 1974. Also, this Court denied a petition for a writ of certiorari in Enskat v. California, October Term 1973, No. 73-1241, 42 U.S.L.W. 3717 (U.S. July 30, 1974), which dealt with the constitutionality of California Penal Code §§311 and 311.2.

Petitioner misunderstands this Court's ruling of June 21, 1973, if he believes they held prior requirements for judging obscenity constitutionally deficient. This Court would

have reversed, rather than remanding. This Court remanded for the purpose of the state court determining whether its statute had been properly construed; in California's case this Court's instructions were carried out and the question properly settled.

6. California Penal Code §311.2 makes it an offense to "knowingly" exhibit any obscene matter. The trial court correctly instructed the jury that "knowingly" means that the Petitioner knew the "character of the concontents of the material in question." To comply with the statute as authoritatively construed there need not have been knowledge of the matter's actual obscenity. Said instructions have been held to be proper on many occasions.

As to the sufficiency of the evidence of scienter, the evidence established that Petitioner owned and operated and "adult bookstore" and that he knew the contents of the

book [R.T. p. 35-59]. In view of the above, Respondent contends that the Petitioner had the requisite scienter necessary and also that the jury instructions were proper.

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny this petition.

Respectfully submitted,

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